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No. 85-1856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAYCO SYSTEMS INC.,

Petitioner,

v.

SAVIN BUSINESS MACHINES CORPORATION,

Respondent.

BRIEF IN OPPOSITION

CORBET F. BRYANT, JR.
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 CRESCENT COURT
SUITE 1500
DALLAS, TEXAS 75201
(214) 855-3000

THOMAS A. GREENE
SCHNADER, HARRISON,
SEGAL & LEWIS
750 THIRD AVENUE, SUITE 3100
NEW YORK, NEW YORK 10017

Attorneys for Respondent

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LISTING OF PARENT AND SUBSIDIARY CORPORATIONS

Respondent Savin Business Machines Corporation was a New York corporation. It merged into Savin Corporation, a Delaware corporation, in 1978. Its parent corporation is Canada Development Corporation. The subsidiaries of Savin are Savin Canada, Inc., Savin Technologies, Inc., Magnetic Laboratories, Inc. and Savin of Tampa, Inc.

STATUTES AND RULES INVOLVED

15 United States Code § 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

15 United States Code § 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the States or with foreign nations . . . ."

Rule 56, Federal Rules of Civil Procedure

* * *

"(c) Motion and Proceedings Thereon . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

Jayco and Mr. and Mrs. Woznick instituted this lawsuit on December 8, 1977 in state court in Dallas County, Texas asserting claims for alleged breach of contract, misrepresentations, and deceptive trade practices. Thereafter, the case was removed to federal court and Savin's action against Jayco for $68,000 of unpaid invoices for open account purchases was consolidated into the present action as a counterclaim.

Despite Jayco's present protestations that Mr. Woznick was outraged by the conduct of Savin in 1976, it was not until the Third Amended Complaint, filed March 24, 1981, and the Fourth Amended Complaint, filed through Motion of July 8, 1981 with Order Granting Leave dated September 21, 1981, that Jayco first asserted violations of federal antitrust law relating to the State of Texas business. Savin has denied that the alleged antitrust conspiracies existed and challenged the standing of petitioner to assert Sherman Act claims.

The summary judgment process below has been quite extended. Savin first moved for summary judgment on August 11, 1980, and, by Order and Memorandum Opinion dated March 2, 1981, the Honorable Barefoot Sanders granted summary judgment in part dismissing certain state law claims with prejudice and dismissing other claims, including federal antitrust claims, with leave to amend. After such amendment, Savin filed a Second Motion for Summary Judgment on December 7, 1981, and on April 19, 1983, Jayco and the Woznicks filed their own Motion for Summary Judgment.

Judge Sanders, by Memorandum Opinion and Order dated January 24, 1984, reiterated his prior grant of Summary Judgment as to a number of the Jayco claims and granted leave for ten days to supplement with facts claims for unfair competition and trade defamation. Oral argument was set for the balance of the claims in the Fourth Amended Complaint then the subject of the motion, including the claims for violations of Sections 1 and 2 of the Sherman Act. Judge Sanders, after extensive oral argument and briefing, granted summary judgment with regard to the antitrust claims and certain other claims. The parties negotiated a Compromise and Settlement Agreement which disposed of the balance of the claims. On July 6, 1984 the Final Judgment was entered by Judge Sanders dismissing the Jayco claims in the Fourth Amended Complaint for alleged Sherman Act violations, with the right of appeal being preserved, and dismissing all other claims pursuant to the Settlement Agreement of the parties.

The Fifth Circuit, on appeal by Jayco of the antitrust determinations, affirmed the lower court for the various reasons set forth at *Jayco Systems, Inc. v. Savin Business Machines Corporation*, 777 F.2d 306 (5th Cir. 1985). Rather than responding to arguments that were not addressed by the district court or the Court of Appeals, Savin shall confine its discussion to the grounds of the decisions below. The Petition for

Writ of Certiorari of Jayco shall be cited as (Pet.) and exhibits in the Appendix of petitioner shall be cited (Pet. App. Exh.).

SUMMARY OF THE ARGUMENT

This is a fact specific summary judgment case. The summary judgment on which review is sought was granted by the Honorable Barefoot Sanders after he presided over the case for almost seven years. Judge Sanders ruled only after an exhaustive review of the large record in this case and the plethora of legal theories urged by plaintiffs. Judge Sanders fully examined the numerous depositions, affidavits, and briefs directed to the summary judgment issues. His grant of summary judgment in favor of Savin was followed by a similarly exhaustive review of the record by the Fifth Circuit Court of Appeals, which affirmed. Both lower courts indulged every required presumption in favor of Jayco and some that were not required.

Savin brought before the trial court the most potent of summary judgment evidence — documents generated by Jayco's owners in the crucial year 1976 and admissions by the participants in Jayco during the early years of discovery in this case. In opposition Jayco has filed conclusory, self-serving affidavits, often containing calculated ambiguity, trying to negate the earlier admissions of the affiant.

In requesting a writ of certiorari, Petitioner Jayco does not seek to have this Court resolve a conflict of views between Courts of Appeal on antitrust issues, or correct a divergence from antitrust law as established by this Court, or even to instruct the Fifth Circuit in proper application of the rule of civil procedure relating to summary judgment. Instead, Petitioner in truth is asking that this Court's limited time be spent in reviewing the admissions made by the principals in Petitioner to determine if they are only "white lies" as claimed by

Petitioner's counsel that should somehow be ignored, or are admissions that may underpin a summary judgment. Petitioner has further totally failed to define the relevant market, particularly the geographic market, and demonstrate the facts necessary for a Sherman Act § 2 monopolization claim.

ARGUMENT AND AUTHORITIES

This is a summary judgment case. Although the claims on appeal below were antitrust claims, no antitrust issues are truly involved in this Petition since the bulk of the Petition merely complains that the courts below came to the wrong conclusion in applying the law to the summary judgment evidence.

Similarly, while Petitioner asserts the Fifth Circuit applied a "new Rule 56 standard" in reviewing the summary judgment, the arguments in support of such claim are simply a rehash of the evidence in the summary judgment record, followed by the conclusion that the Fifth Circuit should not have held the way it did. This case simply does not involve any issues of antitrust or summary judgment law, nor a departure from the "usual and accepted course of judicial proceedings" and therefore does not warrant a review on a writ of certiorari.

This Court should be aware that the Petition often misquotes the Court of Appeals opinion, most frequently by taking the Fifth Circuit reiteration of Jayco's position and referencing that as if it were a finding of the Court of Appeals. For example, Jayco states "The Court of Appeals recognized the Model 300 as the copier industry's version of the Edsel." (Pet. 11, fn. 5). The Court of Appeals did no such thing. It said "The original dispute arose from *Jayco's belief* that Savin had fraudulently burdened Jayco's new dealership with the copying industry's version of the Edsel. . . ." (emphasis added). 777 F.2d at 308.

Likewise, Jayco misstates the Court of Appeals opinion when it claims: "Finally, this is not a case in which the Court of Appeals has questioned the existence of an anti-trust conspiracy. To the contrary, the Court below noted that the facts presented 'a fertile field to hoe'." (Pet. 23) What the Court of Appeals actually said was "After a thorough review of the record, we conclude that although the facts *might* provide *another* a fertile field to hoe, the plaintiff here is left without even a stump to stand on." (emphasis added) 777 F.2d at 308. In its pastoral metaphor the Court of Appeals was simply acknowledging that some other company *might* have standing or *might* be able to define a relevant market. It did not find a conspiracy.

This Court is urged to review with special care Petitioner's various references to the Court of Appeals opinion and characterizations of it.

I. Intent and Preparedness

A. Law on Intent and Preparedness

Petitioner first complains of the Fifth Circuit's holding that it lacks antitrust standing because the claimed injury is damage to a theoretical and highly implausible business expansion by Petitioner. However, the standard which petitioner must meet to raise this claim is well established and not disputed by Petitioner.

In *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed 2d 129 (1969), an American manufacturer of television sets complained of the exclusionary activities of a research company and its "patent pools" in Canada, England, and Australia, alleging that the pools' refusal to sell patent licenses to the American company and certain other acts prevented it from expanding its business into those countries. The Court noted the threshold inquiry to be as follows:

> [T]he issue is whether . . . Zenith wanted and intended to enter [the English market], had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its "business or property by reason of anything forbidden in the antitrust laws." If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under Section 4.

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. at 126-27. (citations omitted).

Put another way, Petitioner must show both (1) intent and (2) preparedness to enter into the new market but for the claimed illegal activity of Savin. *Hayes v. Soloman*, 597 F.2d 958, 973 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Martin v. Phillips Petroleum Company*, 365 F.2d 629 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1966). Among the factors relevant to an assessment of preparedness are the following:

> The ability of plaintiff to finance the business and to purchase the necessary facilities and equipment; the consummation of contracts by the plaintiff; an affirmative action by plaintiff to enter the business; and the background and experience of plaintiff in the prospective business.

Martin v. Phillips Petroleum Company, 365 F.2d at 634 (citations omitted).

Significantly, Petitioner does not dispute the above law as applicable to this case, nor its obligation to show such preparedness in order to overcome Savin's Motion for Summary Judgment. Petitioner complains only that the courts below made the wrong finding. In fact, the findings of the

courts below were based on a thorough review of the entire record, are well reasoned, and are correct.

B. Summary Judgment Evidence Concerning Preparedness and Intent

The summary judgment proof demonstrates that Jayco has totally failed to create any legitimate fact issue concerning intent or preparedness. The trial judge found that summary judgment was required because of the lack of intent and preparedness. The Fifth Circuit was satisfied to rely only upon the lack of preparedness as to the statewide rental bidding. On either or both bases, however, summary judgment was properly granted.

In order for Jayco to be prepared to make the statewide bid for rental machines that it asserts it desired, it would have required at least the following:

(1) Sufficient machines to make a statewide bid;

(2) 100% financing of the machines to put out on rental;

(3) An Austin office due to the concentration of machines that would be in the Austin area; and

(4) A servicing and installing agreement with other Savin dealers throughout Texas.

The intent of Jayco at the relevant times of May, 1976 and thereafter may be gleaned from the actions of Mr. and Mrs. Woznick since Mr. Andreff had left the organization by that time.

(1) Jayco, Through its Principals, Has Admitted Lack of Preparedness and Intent

Although Jayco has feebly attempted to avoid summary judgment through last minute self-serving and conclusory affidavits, the documents generated in 1975 and 1976, together with admissions made in depositions of Mr. and Mrs. Woznick in this case before their counsel realized the impact of the admissions, conclusively demonstrate the true state of affairs concerning the lack of intent and preparedness of Jayco in 1976. For example, Mr. Woznick sent a letter to Savin dated July 8, 1976, in which he stated that even if the 750 model machines were in ample supply, and he could get them, that he was not in a position to put the machines on rental. (Pet. App. Exh. R.) Mr. Woznick did not intend to engage in rental programs, local or statewide, because of the capital outlay which would be required. Jayco had been losing money and a conservative businessman such as Mr. Woznick was not interested in such expansive activity, particularly after Mr. Jerry Andreff left Jayco in the spring of 1976. Mrs. Woznick acknowledged, in one of her depositions, that the reason for the split between her husband and Mr. Andreff was that Mr. Woznick was a conservative businessman who wanted to "creep" and go "slowly" rather than engage in expansions that would require extensive financing, as desired by Mr. Andreff. It is preposterous for Jayco to assert that Mr. Woznick would have made a statewide bid and signed promissory notes for $400,000 in 1976, particularly after Mr. Andreff left. In fact, Mr. Andreff told the Republic banker, Mr. Bishop, that in the spring of 1976, the Woznicks were desirous of retiring and going back to Tennessee since they did not like the photocopy business. This is hardly the state of mind which would have been necessary to engage in the statewide rental bidding process that Jayco now claims it desired.

In addition, Mr. Woznick admitted in a deposition that when he met with a Savin representative and various dealers in the Summer of 1976, concerning the installation and servicing to be done pursuant to Savin's successful state bid, Mr. Woznick declined to have any involvement with the installation and servicing of the machines because he and Mrs. Woznick "had all [the business] we can handle." 777 F.2d at 312.

A further vital and undisputed fact demonstrating lack of intent and preparedness was the fact that when Jayco made a bid in 1975, at a time which it does not claim it was hindered through lack of machines or any other alleged antitrust violation by Savin, Jayco only bid for the rental of machines in zone 4, the Dallas/Ft. Worth area. This was prior to additional losses and prior to the departure of Mr. Jerry Andreff. That bid was unsuccessful. There is no reason to believe that Jayco would have taken substantially greater risks after its more liberal participant had left the company and after additional losses had mounted by the time of the bidding in 1976.

(2) Jayco does not have a History with the State of Texas Indicating Preparedness

Jayco seeks to convince this Court that it had an established history with the State of Texas which would reflect an intent and preparedness that would satisfy those requirements. In fact, the company had no business of the type upon which it bases its current claim. The transaction in 1975 involving approximately 60 machines was a *sale* of Canon copiers that did not require any financing and indeed was on the basis that Jayco was paid by the State of Texas prior to being required to pay its manufacturer and supplier, Canon. Also, such sale did not require Jayco to go to independent dealers and establish a servicing network, nor establish an Austin office.

In fact, Jayco had never been successful in making any zone or statewide rental bid, since it failed in the limited zone 4 bid

made in 1975, as described above. Simply put, Jayco was a company of limited means which could not remotely consider a statewide bid and its history is inconsistent with the assertion that it would have done so had it been given sufficient machines in 1976.

(3) Supply of Machines

The events that transpired in 1976 and thereafter show that hundreds of 750 model machines were needed to meet the State of Texas requirements. Assuming that Jayco requested the machines, Jayco still has failed to demonstrate any reason why Savin would have been required to guaranty, on an unlimited basis, machines for Jayco to bid while denying equivalent machines to the other dealers. In light of the shortage of machines and the time frame in question, a guaranty for Jayco would in effect have been giving extreme favoritism to Jayco over the other dealers, which is not required by the antitrust laws.

(4) Financing the Machines

(a) *The Deposition of Mr. Bishop*

Jayco made no attempt to line-up the 100% financing that would have been necessary to bid and, even had it attempted, it would have failed. The summary judgment record includes the deposition of Mr. Bishop, an independent third-party witness, who was the group manager of the Commercial Loan Division and formerly a commercial loan officer at the Republic National Bank. Mr. Bishop was approached in the spring of 1976, shortly before the bid in question, by Jerry Andreff, vice president of Jayco, who was seeking an $86,000 loan for himself and Jayco to enable him to acquire Jayco from the Woznicks. The testimony of Mr. Bishop is significant for a number of reasons. First, the $86,000 loan was denied, in part because of the weak financial status of Jayco, whose assets

were to be the collateral for the loan. Mr. Bishop, who was faced with the lending decision in 1976, together with other Republic Bank personnel reviewed the Jayco balance sheets for 1974 and 1975, Mr. Andreff's personal balance sheet, Mr. Woznick's personal financial statement, and the other documentation furnished by Mr. Andreff. An independent credit check by the Republic established that Jayco was over $86,000 in arrears to Canon and approximately $90,000 behind in its payments to Savin. Mr. Bishop indicated that he would have denied the $86,000 loan if Mr. Woznick's credit been added to Jayco's. In light of his review of the actual facts at the time, Mr. Bishop stated that a loan of the type needed for the State of Texas business, if requested, would not have been considered favorably.

These determinations are not surprising in light of the fact that Jayco had lost money continually throughout its operations up to that time and also had serious liquidity problems.

(b) The Colleen Collins Affidavit Is of No Import

Petitioner complains that the Fifth Circuit spurned the Affidavit of Colleen Collins, a former bank officer, on the issue of whether Petitioner had the ability to raise the necessary capital to enter the new market. On its face, however, and especially in conjunction with other undisputed facts in the summary judgment record, this affidavit fails to raise a fact issue.

First, it is undisputed that Ms. Collins was never actually approached by Petitioner for a loan. Her affidavit is based on a review of selected and incomplete information (and unidentified statements from plaintiffs) submitted to her long after the fact, which included information which was *not* available at the time the loan would have been necessary, including data on how many copier machines were actually placed by Savin *after*

its bid and the revenues it actually obtained during the time period long *after* the loan in question would have been made.

Second, Collins' evaluation and opinion are particularly suspect because petitioner withheld key financial information from her. Collins' assumption that Jayco had an "excellent" credit history was a false assumption. Jayco had been continually behind in note payments and open account purchases and in early 1976 owed Canon $86,770 and Savin approximately $90,000. Also, she apparently was not made aware of the continuous annual losses of Jayco from its beginning to the date of the hypothetical loan request. She was not advised of the need for an Austin office to make the bid, or that the machines were returnable on 30 days' notice, or that winning the bid and acquiring the machines did not assure the placement of a single machine. Her affidavit is incurably faulty and does not properly join issue with the testimony of Mr. Bishop.

Petitioner takes exception to the Court of Appeals comment that the Collins affidavit was not tested by cross-examination. (Pet. 27) Jayco asserts that "Savin failed to subject her opinion to cross-examination" and that "[i]t is preposterous that Savin should be rewarded for not deposing [Jayco's] expert." (Pet. 27)

The Court's point undoubtedly was simply that Ms. Collins' opinion was of extremely limited value in light of all the other evidence in the record on this point. The mere fact that an affidavit is filed does not mean that summary judgment cannot be granted.

The Court's reference to the lack of cross-examination may also have been an allusion to the exceptionally late filing of the affidavit. The Second Savin Motion for Summary Judgment was filed December 7, 1981. Affidavits, briefs, depositions, and hearings relevant to the motion resulted in an order by Judge Sanders dated January 24, 1984, which ruled on certain of Jayco's claims, granted leave for ten days to Jayco to supple-

ment the record with facts relating to unfair competition and trade defamation claim only and set a new hearing for February 16, 1984, for further oral arguments on certain claims, including antitrust claims (later reset to February 24, 1984, at Jayco's request). In violation of Judge Sanders' January 24, 1984 Order, Jayco filed two affidavits fourteen days later, a "Supplemental Response" on February 7, 1984, the Colleen Collins Affidavit on February 13, 1984, the Affidavit of Robert Mayes (cited in the Petition) on February 22, 1984, and the sixth Affidavit of Jim Woznick and another Affidavit of Jerry Andreff on February 23, 1984. On February 24, 1984, Jayco filed a 29 page "Final Supplemental Response" (with many attachments). Judge Sanders commented at the hearing in February on the unfairness of these late filings, including the Collins Affidavit.

The Colleen Collins Affidavit was filed one day before the date set for final summary judgment oral argument on the antitrust claims (and eleven days before the hearing finally took place after Jayco's requested postponement). That affidavit was filed after the discovery cut-off for the case and long after the summary judgment proof was to be completed (except that relating to unfair competition or trade defamation). Savin could not notice the deposition of Colleen Collins after the filing of her affidavit without violating court orders and there was not sufficient time in any event to do so before the final hearing. The Fifth Circuit comment on the Collins Affidavit was well-taken and both the trial court and the Court of Appeals gave the Collins Affidavit more consideration than it deserved since it should properly have been totally ignored and considered a nullity for its lateness.

Petitioner's most basic error is the attempt to defeat summary judgment by a narrow focus on a single affidavit, without viewing the affidavit in conjunction with the other facts in the summary judgment record. As this Court recently reaffirmed in

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475, U.S. , 106 S. Ct. , 89 L.Ed 2d 538, 552 (1986):

> Where the record *taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *citing First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968) (emphasis added)

The totality of the evidence on financing as discussed above shows that Jayco was incapable and unwilling to acquire the necessary financing for a statewide bid.

(5) Jayco Lacked an Austin Office

A third prerequisite necessary to make a statewide bid, and one which Jayco did not have and made no attempt to acquire, was an Austin office. Jayco had only a Dallas office. A Fort Worth office that it opened closed shortly thereafter as a failure. There is nothing in the summary judgment proof indicating that Jayco ever took the slightest step preparatory to opening the Austin office and there is no indication that Jayco had the financial wherewithal or available bank financing to cover the substantial start-up costs which would be incurred in opening a new office in a distant county.

(6) Jayco did not have a Statewide Servicing Network

Since Jayco insists that it is suing based upon an alleged prospective statewide bid, Jayco would necessarily be required to demonstrate the ability to install machines on a statewide basis and service them. Such demonstration would be required as part of the bid procedure itself. Jayco was not prepared in this aspect of the bidding, however, as it made no attempt to contract with the various dealerships throughout the state for such servicing and installation arrangements. Indeed, when Jayco made its limited zone four bid in 1975, on the 300 series machines, Mr. Woznick admits that the other Savin dealers

declined to agree to service for him. Again, Jayco has failed to show the necessary preparedness to launch the expanded business venture upon which its antitrust claim is based.

(7) Jayco Never Submitted Any Bid in 1976 or Thereafter

Petitioner next complains of the Fifth Circuit's discussion or consideration of the fact that the Petitioner never submitted a bid on either (1) the statewide copier contract, (2) any "open market" contract, or (3) any supplies and paper contracts as probitive of the lack of causation between Savin's acts and Petitioner's failure to bid. Petitioner contends the Fifth Circuit was applying a "new Rule 56 standard" in even reviewing such damning evidence against Petitioner. In fact, the Fifth Circuit's review of such evidence was both proper and required, as noted by the Court in *Matsushita*, *supra.*, ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' ").

Petitioner tries to re-argue the evidence by alleging that its failure to bid for copier contracts was because Savin would not commit machines for Petitioner to sell. Petitioner cleverly ignores its additional failure to bid for copier *supply* contracts, which were unrelated to the copier rental contracts, and which failure highlights Petitioner's disinterest in entering any phase of the State of Texas copier business.

II. Self-Evident Defects in the Alleged Market Doomed Petitioner's Section 1 and 2 Claims

A. The Relevant Market and Savin's Market Power

Petitioner also complains of the rejection of its Sherman Act § 2 monopolization claims by the Fifth Circuit. As the Fifth Circuit opinion details, however, Jayco has totally failed to define the relevant product market, demonstrate by some proof

the propriety of the definition, and define a meaningful geographic market. 777 F.2d at 319-20.

In the deposition of one of Jayco's experts, Shelby Hunt, there is a reference to the "convenience copier market" but there is no attempt by Jayco to relate that to successful and unsuccessful Savin state bids, to explain why other photocopier sales or rentals should not be included, or demonstrate the share of the "convenience copier market" that Savin had at any time. The sole shred of evidence that Jayco offers is a magazine quote encompassing the claim that Savin placed machines with customers in portions of *1978-79* in excess of I.B.M. and Xerox. That is no evidence of Savin's market share of anything, particularly not in 1976.

Jayco also implies, but never seems to directly state, that the Savin photocopiers themselves are the relevant product market while referring to the "demise" of interbrand competition. As the Fifth Circuit noted, Jayco offers no proof or explanation as to why the products of Xerox, I.B.M., Canon, Saxon, Sharp, A.B. Dick, and the others mentioned in the record are not to be considered as part of the product market. Certainly, Shelby Hunt never makes such claim in his deposition. "Exceptional market conditions" are necessary for one brand to constitute the relevant product market when there are competing brands. *Sirdenstein v. National Medical Enterprises, Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985). Jayco has made no showing of exceptional market conditions.

The most glaring defect in Jayco's market allegations is its failure to delineate a rational geographic market. Before the Fifth Circuit it argued that a single purchaser, the State of Texas, should be considered the appropriate geographic market and cited *Grumman Corporation v. LTV Corporation*, 527 F. Supp. 86 (D.C. N.Y.), *aff'd*, 665 F.2d 10 (2nd Civ. 1981) and *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984), *cert. denied* 474 U.S. , 106 S. Ct. 788, 88 L. Ed.

2d 766 (1986). The Fifth Circuit rejected such reasoning and discussed the obvious inapplicability of *Grumman* and *Affiliated Capital*. 777 F.2d at 320. Other circuits have similarly rejected attempts to create a market out of a single purchaser. *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980); *Triple M. Roofing Corp. v. Tremco, Inc.* 753 F.2d 242, 1985-1 Trade Cases ¶ 66,382 (2nd Cir. 1985).

In its petition before this Court, Jayco has shifted position again and now asserts that it is really describing a market of many purchasers, the individual agencies, and not just a single purchaser, the State of Texas. The basis for this approach is that the agencies have considerable discretion in whether to place orders through the annual bidding winner or to go on "open market" bidding. In making such argument, Jayco undercuts its most basic premise — that winning the annual rental bid in June 1976 gave Savin a substantial competitive advantage and damaged Jayco.

Jayco's newly discovered market analysis still does not answer the basic problem highlighted by the Court of Appeals: there is no rational reason why other non-governmental purchasers and renters of photocopiers throughout Texas would not be part of the market. As the Fifth Circuit said, " . . . Jayco's exclusion from the market of all other purchasers within the state is completely arbitrary." 777 F.2d. at 320. Acceptance of Jayco's definition would "allow Jayco to assume what it must prove." *Id.*

The section 2 claims were appropriately dismissed and reversal of that determination is justified only if this Court desires "to clothe each and every sale with an antitrust suit." *Id.*

B. Petitioner's Section 1 Claims are under the Rule of Reason and Require Proof of Market Power

With respect to its Section 1 claims, petitioner's failure to define a relevant market also justified the granting of summary

judgment against it. The Fifth Circuit clearly affirmed Judge Sanders' holding that the restrictions, if they existed at all, were vertical. 777 F.2d at 315. As such they are tested under the rule of reason, which, in turn, requires proof of an adverse effect on a relevant market.

The Fifth Circuit held correctly that there was no evidence of a group boycott. 777 F.2d at 318 n. 41. This conclusion follows even more strongly in light of the Court's recent decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing*, 472 U.S. , 86 L. Ed. 202, 105 S. Ct. (1985), requiring proof that the entity from which the plaintiff is excluded had market power.

Petitioner argues that price fixing is *per se* illegal, but conveniently ignores the Fifth Circuit's ruling that petitioner simply lacks standing to assert any claims related to the alleged price fixing. 777 F.2d at 316.

CONCLUSION

Respondent respectfully prays that Petitioner's Petition for Writ of Certiorari be in all things denied.

Respectfully submitted

CORBET F. BRYANT, JR.
CARRINGTON, COLEMAN,
SLOMAN & BLUMENTHAL
200 Crescent Court
Suite 1500
Dallas, Texas 75201

THOMAS A. GREENE,
SCHNADER, HARRISON, SEGAL
& LEWIS
750 Third Avenue, Suite 3100
New York, New York 10017

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of this Brief in Opposition have been delivered and served on the following:

Samuel L. Boyd
Priscilla E. Perry
Boyd & Fults
Suite 2700
Dallas, Texas 75201

Attorneys for Petitioners

Corbet F. Bryant, Jr.